

BOARDS OF INQUIRY FILE NO. 94-0013

IN THE MATTER OF a Board of Inquiry  
appointed pursuant to s. 38(1) of the  
Human Rights Code, R.S.O. 1990, c. H.19, as amended,

BETWEEN:

MELVA SNOWLING

Complainant

- and -

THE CORPORATION OF THE CITY OF ST. CATHARINES,

LAWRENCE TUFFORD AND JAMES BRADY

Respondents

Date of Complaint: November 28, 1990

Date of Interim Decision: March 2, 1995

Board of Inquiry: Susan Tacon

Appearances: Jennifer Scott, on behalf of the Commission  
Raj Anand, on behalf of the Commission  
Melva Snowling, on her own behalf  
Michael Hines, on behalf of the Respondents



## INTERIM DECISION

In an interim decision dated January 26, 1995, I ruled on the order in which submissions regarding six preliminary motions would be heard since counsel could not agree with respect to that issue. My interim decision ruled that the motions would be dealt with in the following order:

- (a) the Commission's motion to remove counsel of record for the respondents together with the motion of respondents' counsel to sever the complaint dealing with the alleged discrimination from the portion dealing with the reprisal allegation;
- (b) the motion of respondents' counsel seeking disclosure of documents by the Commission relating to the allegations of abuse of process and the Commission's cross-motion for further disclosure;
- (c) the abuse of process motion brought by counsel for the respondents against the Commission and the Commission's cross-motion to quash that abuse of process motion.

The motions in (a) above were heard on the first two days of hearing scheduled for this matter, January 30 and 31, 1995. The parties agreed to relevant facts and documents for purposes of the preliminary motions only. That is, if the documents and facts were relevant to the merits of the complaint, the parties reserved their rights to assert those documents and facts should be properly proved in that proceeding. I reserved my ruling on those motions.

In that regard, it should be noted that Commission counsel agreed that counsel for the respondents could continue to act for the respondents with respect to the preliminary motions. That is, a ruling on the motions in (a) was necessary prior to the commencement of the hearing on the merits, not the remaining preliminary motions.

At the hearing in January, Commission counsel agreed to provide disclosure with respect to the documents in the Commission's investigation file for the instant complaint while reserving the right to object to the admissibility of those documents. Further, it was agreed that disclosure by either party at this juncture was

not tantamount to waiver of either's right to refuse to disclose other documents requested nor did such disclosure on consent have any precedential status with respect to positions on disclosure which might be taken in other hearings. The parties did agree that I issue the following consent order for the record:

On consent of the parties and without prejudice to their positions in this or any other proceeding, the Board orders that the Commission produce its investigation file to the respondents.

The hearing continued on February 15, 16 and 17, 1995. Counsel for the respondents asserted that disclosure of the Commission's investigation file was insufficient in the circumstances and requested further disclosure.

Before proceeding further, it is useful to clarify another matter. The interim decision of January 26, 1995 noted, as well, that the complainant appeared no longer to be represented by her own counsel. At the February hearing, it was confirmed that the complainant was not represented by the Commission either but was appearing on her own behalf. In the circumstances, I explained to the complainant that she was entitled to participate in the hearing on the same basis as counsel for the Commission and for the respondents. I indicated that, as chair, I could not advise her in any way but could clarify terminology or the process if she had any such questions. The complainant was offered the opportunity to make submissions; she did not do so with respect to the motions dealt with herein.

Prior to hearing the disclosure motion, counsel for the respondents wished to enter into evidence a number of documents from the Commission's investigation file which, he asserted, laid the foundation for his request for further disclosure. Commission counsel objected to the receiving of those documents on the basis that counsel for the respondents first had to call viva voce

evidence to prove the documents and to set the context of the documents. Commission counsel asserted that counsel for the respondents, in effect, had to issue a summons duces tecum and then to call those witnesses as his witnesses and be bound by their evidence. That issue will be dealt with further infra.

Following submissions, I ruled orally that I would receive the documents in question. As counsel for the respondents argued, it is preferable that, in deciding upon the motion for disclosure, I view the documents from the Commission's investigation file rather than hear counsel's representations as to what material is contained therein. It must be stressed that there is no question as to the authenticity of those documents; the material is taken from the Commission's own investigation file. Once that ruling was given, Commission counsel sought to place in evidence further documentation, namely, the package of materials which counsel contends were before the Commissioners in reaching their decision to request the appointment of this Board of Inquiry. Those documents were received as well as some further documents, on agreement.

The motion of respondents' counsel regarding disclosure was heard and I reserved. The cross-motion of the Commission was not heard given the Commission's position that the disclosure sought was relevant to the merits of the complaint, not the preliminary matters.

The submissions of counsel are next briefly set out.

Counsel for the respondents submitted that the approach to the issue of disclosure should be that of redressing the imbalance between the Commission's extensive powers to compel disclosure and the respondents' right to sufficient disclosure to prepare their defence or, in the instant case, to documentation relevant to the abuse of process motion. It was asserted the appropriate test

should be arguable relevance and, in the instant case, the documents already disclosed constituted prima facie evidence of impropriety. The jurisprudence regarding the Board's authority to order production was reviewed in support of counsel's representations that the documents requested should be ordered disclosed. The specific material sought covered several categories and is dealt with only in the context of my ruling. With respect to each category, counsel made representations as to why the documents requested were arguably relevant, in the context of the allegations and the material already before me, and why disclosure should be directed. Some of those submissions are outlined in the disposition of the disclosure ruling. Cases cited in support included: Dudnik v. York Condominium Corp. (1990), 12 C.H.R.R. D/325; Christian v. Northwestern General Hospital (1993), 20 C.H.R.R. D/492 (referred to as the "House" decision); Ontario Human Rights Commission v. Ontario Human Rights Board of Inquiry (1993), 21 C.H.R.R. D/498 (Ont. Div. Ct.); Hancock v. Shreve, et al. (1992), 21 C.H.R.R. D/146 (Ont. Div. Ct.); Alan Shreve v. Corporation of the City of Windsor et al. (1993), 18 C.H.R.R. D/363 (referred to as "Shreve").

Commission counsel argued that none of the documents sought (except as noted below, on consent) should be disclosed. It was submitted that the appropriate test was whether the documents were "legally" relevant. Counsel contended that, as long as there was evidence on which the Commissioners could base their decision to request that a Board of Inquiry be appointed, the level of abuse involved in the Commission's investigation was not relevant. And, if that was not relevant, the documents relating to the abuse motion were not "legally" relevant and, thus, should not be ordered disclosed. Further, it was suggested that the respondents should bring an application for judicial review if they considered that the investigation process was so flawed that the complaint should be terminated on that ground. In the alternative, counsel indicated that the Commission would lead evidence to establish that the

complainant's father could no longer be regarded as influential. Counsel also outlined the evidence which would be led regarding the handling of the complaint and to establish that the instant complaint was not given preferential treatment. If such evidence included testimony by Commission staff, counsel for the respondents could request further disclosure at that time, when the relevance of the documents became clear. Counsel expressed a concern to the effect "where will it all end" if the disclosure sought was granted. With respect to the specific categories of disclosure, counsel argued that, generally, these were speculative and tantamount to "fishing expeditions". As to the personnel files, counsel emphasized the personal nature of that material. In regard to what was referred to as the "Grantham Optomists" complaint, it was argued that file was not relevant except as to the record of a telephone conversation between Patrick Robson and the successful candidate in the instant complaint and, further, the file contained information personal to the complainant in the "Grantham Optomists" complainant. Cases cited in support included: Mike Naraine v. Ford Motor Company of Canada Ltd., et al. (April 21, 1994, unreported, Backhouse) (referred to as "Ford 1"); Ford Motor Company et al. v. Ontario Human Rights Commission et al. (January 13, 1995, unreported, Ont. Div. Ct.) (referred to as "Ford 2").

In reply, counsel for the respondents noted that the "Ford 2" decision, supra, affirmed the jurisdiction of the Board to stay the proceedings if the Board concluded that was warranted. Further, in Jeremy Hancock, supra, (which concerned the same complaint as was ultimately dealt with in Shreve, supra), the court indicated that it was preferable for a Board of Inquiry to determine in first instance whether a complaint should be stayed or dismissed for abuse of process (in that case, delay). Other comments in reply regarding the substance of the requested disclosure are not recounted.

I have considered the submissions of counsel and the jurisprudence

cited. While I do not regard it as necessary to extensively review that case law, some comments are appropriate prior to dealing with the specific documents requested.

Commission counsel's argument was based, in large part, upon the notion of "legal" relevance. That is, the only issue of relevance was not whether there had been an abuse of process, but whether there was some evidence before the Commissioners on which they could request a Board of Inquiry be appointed. Commission counsel also submitted that the proper route for counsel for the respondents with respect to an abuse of process motion was an application to the courts seeking a stay. With respect, I disagree with both those arguments.

In Jeremy Hancock, supra, the applicant therein sought a prohibition of a Board of Inquiry hearing on grounds, in effect, involving an asserted abuse of process. The application was quashed as premature. In the decision, the court noted that the Board of Inquiry should decide in first instance whether the complaint should be stayed or dismissed on those grounds. That reasoning is consistent with the approach of courts generally with respect to such matters arising in administrative tribunal proceedings and with remarks to similar effect in Ford 2, supra. Accordingly, counsel for the respondents may proceed with his abuse of process allegations before me.

Further, I am of the view that I have jurisdiction to stay or dismiss proceedings on grounds of abuse of process or denial of natural justice. Such a conclusion was reached by the adjudicator in Alan Shreve, supra. In Ford 1, supra, the adjudicator there determined that it was not appropriate, in the circumstances before her, to uphold a motion to stay the proceedings. In so doing, the adjudicator expressed her concern with respect to the consequences for a complainant of upholding such a motion. On judicial review, the court in Ford 2, supra, found that the application was

premature, for the reasons stated therein and which are not, at this time, relevant. However, the court did not suggest that a Board of Inquiry did not possess the jurisdiction to grant the order to stay or dismiss the proceedings. Indeed, the court, at pp. 7-8, outlined the appropriate test to be applied in such cases, namely:

The proper test on the issue of prejudice to determine whether a hearing can proceed without a denial of natural justice or abuse of process is properly set out in the Nisbett case at p. D/510 and we adopt it as follows:

The question is simply whether or not on the record there has been demonstrated evidence of prejudice of sufficient magnitude to impact on the fairness of the hearing.

The court also noted that a Board of Inquiry must be correct in its conclusion with respect to the issue of a denial of natural justice or abuse of process.

Thus, I am satisfied that I do have the authority to issue the order sought by counsel for the respondents. Whether, ultimately, I am persuaded that such an order is appropriate in the circumstances of this complaint is another question. However, since I possess the requisite authority to deal with the abuse of process motion, the issue of disclosure is to be determined with reference to the usual standard, i.e., is the material sought arguably relevant to that abuse of process motion. In deciding that question, I must weigh the competing interests. The respondents are entitled to disclosure of documents which I conclude are arguably relevant but are not entitled to conduct a "fishing expedition". My conclusion in each instance depends, of course, upon the documents in question under each category.

It is also important that I have regard to the effect of my order (to disclose or not) on the conduct of the proceedings. There is a public interest, apart from the interests of the parties, that

procedural matters be dealt with in a fashion which is fair and conducive to an expeditious hearing of the matter. In that regard, I adopt the approach articulated in the House case, supra, and approved of by the court in Ontario Human Rights Commission, supra, concerning disclosure by the Commission. The broader question of "pre-hearing" disclosure akin to discovery need not be addressed by me since the hearing in this complaint has commenced; the concern, thus, shifts to my authority to control the proceedings so as to give all parties a fair opportunity to be heard while not permitting abuse of the process.

I now turn to the issue of disclosure of the specific documents requested.

1. The Commission's procedures manual dealing with complaints from the investigation stage to a determination as to whether a Board of Inquiry should be appointed, that is, excluding intake and reconsideration procedures is to be disclosed. This item is noted for the record as Commission counsel agreed to produce this material.

2. Counsel for the respondents requested all documents relating to the winding down of the Special Task Force, including:

(a) instructions to managers and officers with respect to what to do with cases on hand, i.e., how those files were to be dealt with;

(b) the specific files which were returned to the Regions of origin;

(c) in the alternative to (b), the contents of the files that reflect the stage in the process when the files were transferred back to the Region of origin, i.e., all documents reflecting the degree of maturity of the file;

(d) in the further alternative to (b) and (c), the contents of the files that reflect the stage in the process when the files were transferred back to the Hamilton/Niagara Region.

I am persuaded that there is sufficient basis in the documents currently before me to lay the foundation for a further order for disclosure with respect to the documents in (a) and (d) and I so order. The allegations assert impropriety in the manner in which the complainant's file was dealt with in referring the complaint to the Special Task Force and then back to the Hamilton/Niagara Region. The documentation already disclosed raises questions as to the basis for those decisions by the Commission. It may well be that I conclude the respondents have not proved their allegations or, even if proved, terminating the instant complaint may not be appropriate. Those determinations lie in the future. At present, the respondents are entitled to access to the documentation covered in (a) and (d). For the moment, I am of the view that the material covered in (b) and (c) casts a net too broadly and that the balance between arguable relevance and a "fishing expedition" is properly struck in the order given.

3. Counsel for the respondents requested the disclosure of the Commission's entire investigation file with respect to the "Grantham Optomists" complaint. Counsel acknowledged that much of the material was of no interest to the respondents and any review would be approached in the context of his professional obligations. In the alternative, counsel argued that the Commission be given criteria for disclosure and those criteria were outlined.

In my view, the respondents are entitled to access to the entire "Grantham Optomists" file. The investigating officer in the instant complaint who recommended the appointment of a Board of Inquiry was also the officer in the "Grantham Optomists" file. In the course of investigating the "Grantham Optomists" complaint, the officer had allegedly controversial contact with the successful candidate for the position which the complainant herein contends she was improperly denied. Further, there are comments with respect to the "Grantham Optomists" in the instant complaint, which comments are linked to the issues in this complaint. As well,

there is the implication in the Commission's investigation that the fact that the two individual respondents and the successful candidate were members of the "Grantham Optomists" was relevant to the hiring decision. Commission counsel indicated she was prepared to disclose the record of the telephone conversation between the officer and the successful candidate. I do not regard that as sufficient in the circumstances. A party is not entitled to pick and choose what it wishes to disclose and then conceal the rest. Rather, the test is arguable relevance. That test is satisfied, in my opinion. Whether the review of the "Grantham Optomists" file is fruitful from the respondents' perspective is a separate issue. On the material currently before me, they are entitled to review that file.

In so ordering disclosure, I have not ignored the fact that the file contains material which is not germane to the instant complaint whatsoever. Those concerns may be addressed in restrictions on access. Counsel for the respondents (or another member of his firm) may review the file at the Commission's premises in the presence of a Commission representative, if the Commission so chooses. Counsel already noted and undertook to comply with his professional obligations against disclosing material not germane to the instant case but to which he has been permitted access in the context of a disclosure order. Counsel is entitled to copies of material from that file which relates in any way to the allegations in the abuse motion, including communications with or about "Optomists", the Commission's investigation of "Optomists", conclusions and comments about "Optomists" or relating in any other way to "Optomists" individually or collectively.

4. Counsel for the respondents initially requested the entire personnel file for a number of named individuals. That broad request, with respect to those persons, was later amended to:

(a) the titles and dates of positions held between November 1989

and February 1994;

(b) with respect to Robert Young and Lolita Phillips, their dates of hire if such were prior to November 1989;

(c) the last known address of Frank Butler and, if he cannot be located, his entire personnel file;

(d) limited disclosure of the personnel files of Lori Rainone, Susan Jostman and Patrick Robson, including: an itemized list of the contents of the personnel files; disclosure of biographical information prior to their employment with the Commission; and, an opportunity to seek further disclosure, depending on the itemized list of contents.

Much of the material requested under this category is highly personal to the individuals involved and, in my view, there must be a clear nexus between such information and the abuse motion. At this stage, I find that such a connection is not apparent or, to use an alternate phrasing, that the involvement of the named persons in the investigation of this complaint outweighs the competing considerations so as to warrant disclosure. Thus, the material requested in (d) is not ordered. If such material becomes arguably relevant during the hearing of the abuse motion, the matter may be revisited. At present, the disclosure request is denied.

In contrast, the information in (a) and (b) relates to the employment of the individuals with the Commission and it appears that some of the persons held several positions during the relevant period and were involved in the investigation of the complaint. Moreover, the information sought is of a different nature than that in (d). Accordingly, I order the Commission to provide the titles and dates of positions held between November 1989 and February 1994 with respect to: Patrick Robson, Robert Young, Lori Rainone, Susan Jostman, Frank Butler, Glen Morrison and Lolita Phillips. With respect to Lolita Phillips and Robert Young, their dates of hire are to be disclosed, if those dates are prior to November 1989.

The information sought in (c) is also subject to somewhat different considerations. Frank Butler was involved in the initial investigation of the complaint; he is no longer an employee of the Commission. The respondents have reason to wish to contact him in connection with their abuse motion. Weighing the competing considerations, I find that the respondents are entitled to disclosure of Butler's last known address. If that information does not result in his being located, however, I would not grant the disclosure requested in the alternative for the reasons noted in the discussion of (d).

5. Counsel for the respondents also requested what he characterized as an "omnibus" order for disclosure of all other documents not previously disclosed and not privileged in the possession of the Commission or the Commissioners which relate in any way to the complaint. Counsel indicated that he accepted Commission counsel's assurance that he had seen everything in the Commission's investigation file. However, he asked that Commission counsel be directed to make enquiries to ensure that other copies of disclosed material (which might have annotations not on the copies disclosed) or other material did not exist elsewhere in the Commission's possession. Counsel submitted that the appropriate test was not that such enquiries might be onerous but, to assist, drafted a letter to be sent by Commission counsel and specified those persons he regarded as appropriate recipients.

There is no doubt that, if such material exists outside the Commission's investigation file, that material meets the test of arguable relevance. Commission counsel could not give an undertaking that known copies of the disclosed material held outside the Commission's investigation file were, in all respects, identical to that disclosed. I am satisfied that the order sought should be granted, at least in part, in that Commission counsel is directed to send the letter set out below to the following list of persons:

Glen Morrison	Susan Jostman	Neil Edwards
Mark Frawley	Lori Rainone	Robert Young
Christine Karcza	Lolita Phillips	Patrick Robson
Fiona Sim (Hamilton/Niagara Region)		
Mollie Karmany (Freedom of Information)		
Marty Schreiter (Special Task Force).		

The brackets indicate that, if the named person is no longer with that committee, region or organization, his/her replacement or other person with control over the files of that body is to be substituted. Similarly, if any of the named persons is no longer a Commission employee, the last known address of that person(s) is(are) to be provided to counsel for the respondents.

I am satisfied that the form of the letter indicates with sufficient precision the documents which are to be produced to Commission counsel, if such exist in the possession of any of the named persons. It should be noted that both counsel made submissions, which I have considered, concerning the text of the letter and that much of the text was not in dispute, if I was persuaded that the "omnibus" order should be granted.

Because of the dates scheduled for continuation of these proceedings, the letter is to be sent by fax to the persons affected if those individuals are not employed at the Commission's offices in Toronto. Further, counsel for the respondents is to be given immediate access to any documents delivered to Commission counsel as a result of the letter. Counsel for the respondents is also to be given copies of the letters returned to Commission counsel responding in the negative. Commission counsel is to contact the complainant by telephone to inquire as to whether the complainant wishes copies immediately of any material or information disclosed to counsel for the respondents.

I am also satisfied that it is not appropriate, at this juncture, to direct that the letter be sent to the panel of Commissioners who determined that a Board of Inquiry should be requested nor that

their notes, if such exist, be disclosed. In my view, there is insufficient foundation at present to include those persons within the scope of the order. The Commissioners are not compellable witnesses under the statute and, in my opinion, to order disclosure of their notes, for example, would force such testimony to explain those documents, if such exist.

Nor am I persuaded that the direction for disclosure should include the Chief Commissioner. In that regard, counsel for the respondents indicated that he was content with the substitution of the Executive Director provided that the Executive Director was aware that it was incumbent on him, pursuant to the order, to review any files in the office of the Chief Commissioner relating to this complaint. I hereby direct Commission counsel to inform the Executive Director of the extent of the obligation contained in this order for disclosure which, includes, as well, for purposes of clarity, the material placed before the Commissioners (referred to as the "Commission package") on which they based their decision. This clarification is necessary because, while Commission counsel indicated that the material referred to as the "Commission package" contained all the material in the file when she reviewed it (and counsel for the respondents accepted her assurance), Commission counsel could not confirm that the material represented all the material placed before the Commissioners in respect of this complaint.

The text of the letter reads:

Dear \_\_\_\_\_:

Re: Melva Snowling and Corporation of the City of St. Catharines,  
Lawrence Tufford and James Brady, File No - 135T

This file involves a complaint concerning sex-based discrimination (denial of promotion) and reprisal. It began by way of a complaint filed January 30, 1990. The file was transferred from the Hamilton/Niagara Region to the Special Task Force in December, 1990. It was investigated by Officers Frank Butler, Lori Rainone,

Robert Young and Patrick Robson. In September 1993, it was returned to the Hamilton/Niagara Region. In June 1994, a Board of Inquiry was appointed.

The Board of Inquiry has ordered production of all documents in the possession of the Commission or any of its employees which relate in any way to Ms. Snowling's case, including documents relating to the Commission's handling and processing of the file.

Since you have had some involvement with this file, you are obliged by the Board's order to deliver to me any such documents which are in your possession. Please convey all such documents to me no later than one week from receipt of this letter. If you have no such documents and are unaware of any such documents, please so advise me immediately by fax by returning to me your copy of this memo with the confirmation indicated below. If you are aware of any such documents but cannot deliver them to me for any reason, please advise me in writing, also by fax, of the nature and location of such documents. If you are in doubt as to your connection with this file, please contact me for clarification.

Thank you for your co-operation.

"Jennifer Scott"

\_\_\_\_ I have no documents in my possession and am unaware of any documents relating in any way to this complaint.

It is necessary in this decision to note several other matters for the record.

Because of the dates scheduled for continuation, I indicated to the parties that this decision would be faxed to them. The complainant stated that she was content to receive the decision by regular mail; Commission counsel undertook to inform the complainant by telephone of the gist of the decision forthwith on her receipt of this decision.

Commission counsel was directed to file her submissions in writing by February 24, 1995 if she wished to maintain her position that counsel for the respondents must issue a summons duces tecum to establish the authenticity of the Commission's documents through viva voce evidence and would then be bound by their testimony.

Commission counsel did make submissions and that issue is dealt with infra.

At the February hearing, I directed counsel for the respondents, prior to the dates for continuation, to inform Commission counsel as to whether he intends to call viva voce testimony in respect of the abuse of process motion. In that regard, I directed the parties to review the material facts which counsel for the respondents wished to establish to see if those facts were in dispute or could be agreed to so as to expedite the hearing. If such agreement was not forthcoming, counsel for the respondents should be prepared to proceed with his witnesses.

Moreover, I directed the parties that, should any other issue arise prior to the continuation dates, that party should inform me and the other parties of that issue immediately by fax. If the party was making a request, that should be accompanied by full submissions on the matter. I would then determine whether further submissions would be required or what other procedure was appropriate. This direction was given in order to facilitate the hearing of the evidence and submissions with respect to the abuse of process motion (and the motion to quash that motion). The complainant reiterated her position that delivery by mail was sufficient for her and, again, Commission counsel undertook to inform the complainant by telephone should such matters be raised. Given my direction, I am hereby informing the parties that I will be out of the country from March 10 to March 23, 1995.

I next turn to the issue of the admissibility of the documents from the Commission's investigation file or otherwise in the possession of the Commission.

In written submissions filed by fax and dated February 24, 1995 with respect to the admissibility of documents from the Commission's investigation file, Commission counsel took the

27

position that counsel for the respondents need not call Commission staff to introduce into evidence documents created by Commission staff. Further, counsel consented to the filing of the documents from the Commissions' investigation file (marked as exhibit 20). Counsel reserved her right to object to the admissibility of the contents of those documents not created by Commission staff for the truth of the statements contained therein. Counsel submitted that hearsay evidence, in the form of the documents, should not be admitted where direct evidence is available. Thus, counsel reserved the right to object to the admissibility of the contents of the correspondence from respondent counsel, counsel for the complainant and the complainant herself on grounds including, but not limited to, hearsay and privilege.

In dealing with this issue, I note that the complainant did not indicate that she wished to make submissions on this matter and, further, I do not consider it necessary to call upon counsel for the respondents for submissions. I also note that counsel for the respondents, in his motion seeking further disclosure, stipulated that he was not seeking disclosure of privileged documents.

I am satisfied that the documents in question are admissible. It must be emphasized that there is no issue as to the authenticity of the documents. It would unnecessarily prolong the hearing to require the issuance of a summons duces tecum by counsel for the respondents to the authors of those documents to produce those documents and prove their existence. Such a parade of witnesses for that purpose would consume a considerable number of hearing days, necessitate frequent adjournments to review the material and, consequently, not assist in hearing this matter expeditiously. There is no reasonable basis to then require, as Commission counsel initially indicated, that those persons be considered witnesses for the respondents so that the respondents would be bound by their testimony. The abuse of process motion raises serious allegations with respect to the Commission's handling of the complaint and

seeks the termination of these proceedings without a hearing on the merits. To require counsel for the respondent to call the very Commission staff whom he asserts acted improperly as his witnesses in order to prove the authenticity of the documents in the Commission's file is not warranted on a proper reading of the law or my authority to control these proceedings to give each party a fair opportunity to be heard.

In that regard, I concur with the following comments from Dudnik, supra:

[58] As well, it is noted that a person subject to a subpoena duces tecum need not be a witness beyond the mere production of the documents specified in the subpoena: Olarte, supra, at paras. 14603 and 14604. That is, the party requesting the subpoena for the witness does not put that witness on the stand as that party's witness for any and all purposes.

In Ken Johnson v. East York Board of Education (1988), 9 C.H.R.R. D/4791, the adjudicator therein noted the jurisprudence consistent with the statement articulated in Dudnik, supra, but ultimately concluded otherwise in the circumstances of that case. With respect, I agree with the approach in Dudnik, supra, and the cases cited in Johnson, supra, including the conclusion of another administrative tribunal (the Ontario Labour Relations Board) that a person subject to a subpoena duces tecum need be a witness only to the extent of producing the documents in the summons.

In the instant case, I am not prepared to require the issuance of summonses duces tecum to produce those documents constituting the Commission's investigation file for the reasons noted and pursuant to my authority in ss. 12(1) and 23(1) of the Statutory Powers Procedure Act, R.S.O., 1990, c. S.22.

Nor am I persuaded that it is appropriate to require counsel for the respondents to call the complainant or the complainant's counsel (at the time) to prove the existence of the documents in

question. The complainant is not asserting that those documents are other than what they purport to be. An adjudicator, in conducting a hearing, must be cognizant of the alignment of interests in a particular proceeding. It would not be appropriate to require a party to call the party opposite as his/her witness and be bound by that testimony or to permit those parties aligned in interest to cross-examine one another freely without taking the litigation realities into account when considering the weight to be accorded to evidence.

The question of admissibility is a separate issue from other matters regarding the documents, such as, their probative value and whether the documents, of themselves, constitute proof of the truth of their contents. The question of weight is properly argued by the parties in their submissions. As to whether any document, of itself, proves the truth of its contents will depend on the nature of the document and, of course, on the purpose for which it is introduced. From positions taken by counsel for the respondents, for example, it would appear that, with respect to a number of the documents, he is not asserting that the documents be accepted for the truth of their contents.

In my view, it would be inappropriate to here rule on more than the admissibility of the documents. The documents are now before me. If a party wishes to establish the truth of the contents of a particular document authored by it and those facts are in dispute, that party should do so in the usual course. The respondents bear the legal onus with respect to the abuse of process motion. That legal onus does not change. It may well be that the respondents meet their initial evidentiary onus so that the Commission (and the complainant, if she wishes) must call evidence in response. It is for the parties to decide what evidence to call to prove their case or rebut evidence called by a party opposite.

One other matter merits comment. Commission counsel is being

replaced by Mr. Anand for the remainder of these proceedings. The suggestion was raised by Mr. Anand that I not continue to hear the abuse of process motion because of my unavailability with respect to further continuation dates. It was stressed that the basis for this request was solely the issue of scheduling further hearing dates. Before dealing with this issue, it is necessary to briefly sketch some background.

This hearing commenced, as is usual, with a conference call in July 1994 amongst myself, Commission counsel, counsel for the respondents and counsel for the complainant. At that time, the only preliminary issue, raised by counsel for the respondents, dealt with disclosure. Counsel felt that a current Freedom of Information request would resolve that issue, as the Commission was resisting disclosure of its investigation file. Unfortunately, the FOI ruling was not released until December and, as a consequence of what was disclosed, counsel for the respondents brought the motion for disclosure dealt with above. At the conference call, the parties indicated that ten days would be needed for the oral hearing and those dates were set after canvassing the parties' schedules. Commission counsel did not raise the motion regarding the removal of counsel of record for the respondents because, apparently, she had not read the file sufficiently. When she did so in December 1994, the preliminary motion noted earlier was raised, which motion prompted the motion to sever the initial complaint from the reprisal allegation.

When the hearing commenced in January 1995, I urged the parties to facilitate the hearing of the preliminary matters through agreements and disclosure wherever possible. I indicated at that time that, should the ten dates be insufficient to complete the hearing, I was not available for further dates until January 1996. I suggested that, if the parties agreed, it might be appropriate for me to hear and determine the preliminary motions and then have the merits of the complaint (if the abuse of process motion was

unsuccessful in terminating the proceedings) heard by another Board of Inquiry. The parties were asked to consider that question as we proceeded through the preliminary motions.

The dates set for continuation in February 1995 were utilized for the disclosure motion and the prior motion by the Commission as to whether I could review documents from the Commission's investigation file in hearing the disclosure motion. At this point, only five continuation days remain.

It was in that context that Mr. Anand, for the Commission, suggested that the abuse of process motion might not be completed in the allotted time, given that the Commission might well call numerous witnesses. In that regard, counsel was not prepared to give an undertaking that any or all of those possible witnesses would be called. Counsel expressed concerns about the prospect of continuation dates in January 1996 and indicated that other adjudicators would be available more expeditiously.

I do not regard it as necessary to set out the comments of counsel for the respondents and of the complainant. I am not persuaded that I should not continue to hear the remaining preliminary motions. My reasons are given briefly.

By letter dated June 10, 1994, I was appointed to hear and determine this complaint. The conference call commencing the proceedings was held in July 1994. The parties agreed with respect to the scheduling of the in-person hearing dates. Because of the preliminary issues raised subsequently, those dates will be insufficient to conclude the hearing. Indeed, it may well be that the remaining dates are insufficient to conclude the evidence and submissions regarding the preliminary motions.

As noted, I indicated to the parties that, on agreement, it might be appropriate to sever the preliminary motions from the merits so

that the merits hearing would not depend on my availability (or lack thereof). In my view, that would be somewhat unusual but might well be appropriate, on agreement, in the circumstances.

However, in my view, there is no compelling basis for me not to continue to hear and determine all of the preliminary motions. The preliminary motion regarding disclosure brought by counsel for the respondent is in respect of his abuse of process motion. Considerable material has already been reviewed in the context of that motion. I am satisfied that the disclosure motion and the abuse of process motion are so significantly inter-connected that they should be determined by the same adjudicator. I am in the midst of that process and am not convinced that the preliminary motions are severable one from another.

Moreover, there is an institutional concern which militates against the continuation of the hearing before a different adjudicator. Processes which might encourage "forum-shopping", in effect, should be discouraged. Mr. Anand emphasized that no such concerns prompted his suggestion and that it was solely a matter of early availability should the scheduled days be insufficient. I accept Mr. Anand's comments in that regard. But such concerns, in part, formed the basis for the suggestion that, if the parties so agreed, the merits hearing might continue before another adjudicator and, in that event, I would not insist on continuation, given my schedule.

In the discussion with respect to this issue, I did raise the prospect of additional hearing dates on weekends and in July and August, such dates basically to be set without regard to the schedules of the parties. On reflection, I am not convinced that would be appropriate.

In the instant case, the parties have insisted on their right to make submissions on matters which could well have been resolved

between them or raised much earlier. The motion to remove counsel of record for the respondents has already been noted. Further, the Commission has resisted disclosure of what are clearly relevant documents. The Commission, in part, has maintained its technical position that counsel for the respondents must issue a summons duces tecum to prove documents in the Commissions' possession and be bound by the testimony of the authors once the documents are proved in evidence. The Commission is entitled to argue such matters before me. However, it is less than compelling when the Commission then argues for an expeditious hearing of the complaint, particularly in the context that the complaint was filed in November 1990 and the Commission did not request the appointment of a Board of Inquiry until April 1994.

Commission counsel has indicated that the Commission may call a number of witnesses in connection with the abuse of process motion. It goes without saying that each party is entitled to present relevant evidence subject to the usual rules regarding admissibility and the like. In my view, the hearing of that evidence may be facilitated. To that end, I hereby direct the parties as follows:

(a) no later than one week prior to the dates scheduled for continuation, each party is to deliver to the others "will say" statements in writing (and copied to me at the same time) for each of the witnesses that party intends to call;

(b) if a party does not comply with this direction in respect of one or more witnesses, that party must satisfy me as to why the direction could not be complied with and why, in the circumstances, that party should, nonetheless, be permitted to call that witness(es);

(c) for purposes of this direction, the complainant is considered a party with respect to receiving copies of "will say" statements and filing such statements if she intends to lead evidence with respect to this issue; to date, the complainant has not indicated that she has any evidence to lead on the abuse of process motion.

I regard this direction as sufficient to significantly expedite the

hearing process. It may be that, when presented with the "will say" statements, the matters contained therein can be agreed to by the parties. If not, when each witness is called, that witness need merely confirm the written "will say" statement and the other parties may then commence cross-examination. Such a process will avoid lengthy direct examination and any delay in commencing cross-examination.

If the preliminary motions are not completed in the time scheduled, the hearing will be continued on dates to be set consistent with the availability of the parties and myself.

DATED this March 2, 1995.

A handwritten signature in dark ink, appearing to read 'Susan Tacon', is written over a horizontal line.

Susan Tacon  
Chair, Board of Inquiry